

SHELLIE L. KAY,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
Defendant.

**BEFORE THE COURT** are cross-motions for summary judgment noted for hearing without oral argument on June 1, 2012. (ECF No. 16, 22). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Gerald J. Hill represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7). On December 14, 2011, plaintiff filed a reply. (ECF No. 22). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's Motion for Summary Judgment

Plaintiff applied for a period of disability and disability insurance benefits (DIB) on January 30, 2009, alleging disability as of January 26, 2009 (Tr. 14). The applications were denied initially and on reconsideration.

Administrative Law Judge (ALJ) Gene Duncan held a hearing on March 5, 2010 (Tr. 35-97), and issued an unfavorable decision on March 31, 2010 (Tr. 14-23). The Appeals Council denied review on November 19, 2010 (Tr. 1-6). The ALJ's March 2010 decision became

1 the final decision of the Commissioner, which is appealable to the  
2 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
3 this action for judicial review on December 13, 2010. (ECF No. 2,  
4 4).

5 **STATEMENT OF FACTS**

6 The facts have been presented in the administrative hearing  
7 transcript, the ALJ's decision, and the briefs of the parties.  
8 They are only briefly summarized here.

9 Plaintiff was born on March 22, 1962, and was 46 years old on  
10 the date of the ALJ's decision (Tr. 21). She obtained her high  
11 school diploma and attended two years of college (Tr. 38-39). She  
12 is certified as a medical assistant (Tr. 39). She last worked six  
13 months prior to the administrative hearing (Tr. 40) and has past  
14 relevant work as a daycare provider and certified medical  
15 assistant (Tr. 21).

16 At the hearing, plaintiff testified that she could not return  
17 to her prior work because of "chronic fatigue" and "chronic flu  
18 symptoms" (Tr. 40). She stated that the main condition that  
19 causes her to miss work is rheumatoid arthritis (Tr. 40).

20 Plaintiff indicated that she has been diagnosed with "zero gravity  
21 rheumatoid arthritis" because all the tests come back negative,  
22 but the symptoms are real (Tr. 53). She described the symptoms as  
23 chronic fatigue and pressure in the joints (Tr. 54). Plaintiff  
24 testified that she had pain in her back, hands and feet (Tr. 56)  
25 and that ibuprofen seems to help with the symptoms, along with  
26 muscle relaxers at night (Tr. 57). Plaintiff stated that the  
27 fatigue affects her eyesight and she can only read for about half  
28 an hour before she has blurred vision (Tr. 60). She has also been

1 diagnosed with sleep apnea and suffers from migraine headaches,  
2 asthma, rapid heartbeat, diabetes controlled with diet, and  
3 diabetic neuropathy.

#### 4 SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act (the Act) defines disability as the  
6 "inability to engage in any substantial gainful activity by reason  
7 of any medically determinable physical or mental impairment which  
8 can be expected to result in death or which has lasted or can be  
9 expected to last for a continuous period of not less than twelve  
10 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
11 provides that a Plaintiff shall be determined to be under a  
12 disability only if any impairments are of such severity that a  
13 plaintiff is not only unable to do previous work but cannot,  
14 considering plaintiff's age, education and work experiences,  
15 engage in any other substantial gainful work which exists in the  
16 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
17 Thus, the definition of disability consists of both medical and  
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
19 (9<sup>th</sup> Cir. 2001).

20 The Commissioner has established a five-step sequential  
21 evaluation process for determining whether a person is disabled.  
22 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
23 is engaged in substantial gainful activities. If so, benefits are  
24 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If  
25 not, the decision maker proceeds to step two, which determines  
26 whether plaintiff has a medically severe impairment or combination  
27 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
28 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination  
2 of impairments, the disability claim is denied. If the impairment  
3 is severe, the evaluation proceeds to the third step, which  
4 compares plaintiff's impairment with a number of listed  
5 impairments acknowledged by the Commissioner to be so severe as to  
6 preclude substantial gainful activity. 20 C.F.R. §§  
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
8 App. 1. If the impairment meets or equals one of the listed  
9 impairments, plaintiff is conclusively presumed to be disabled.  
10 If the impairment is not one conclusively presumed to be  
11 disabling, the evaluation proceeds to the fourth step, which  
12 determines whether the impairment prevents plaintiff from  
13 performing work which was performed in the past. If a plaintiff  
14 is able to perform previous work, that plaintiff is deemed not  
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
16 this step, plaintiff's residual functional capacity (RFC) is  
17 considered. If plaintiff cannot perform past relevant work, the  
18 fifth and final step in the process determines whether plaintiff  
19 is able to perform other work in the national economy in view of  
20 plaintiff's residual functional capacity, age, education and past  
21 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish  
24 a *prima facie* case of entitlement to disability benefits.  
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
26 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
27 met once plaintiff establishes that a physical or mental  
28 impairment prevents the performance of previous work. The burden

1 then shifts, at step five, to the Commissioner to show that (1)  
2 plaintiff can perform other substantial gainful activity and (2) a  
3 "significant number of jobs exist in the national economy" which  
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
5 Cir. 1984).

#### 6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a  
8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
9 the Commissioner's decision, made through an ALJ, when the  
10 determination is not based on legal error and is supported by  
11 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
12 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
13 1999). "The [Commissioner's] determination that a plaintiff is  
14 not disabled will be upheld if the findings of fact are supported  
15 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
16 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
17 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
18 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
21 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
22 evidence as a reasonable mind might accept as adequate to support  
23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
24 (citations omitted). "[S]uch inferences and conclusions as the  
25 [Commissioner] may reasonably draw from the evidence" will also be  
26 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
27 On review, the Court considers the record as a whole, not just the  
28 evidence supporting the decision of the Commissioner. *Weetman v.*

1 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
2 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to  
4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
5 evidence supports more than one rational interpretation, the Court  
6 may not substitute its judgment for that of the Commissioner.  
7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
8 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
9 substantial evidence will still be set aside if the proper legal  
10 standards were not applied in weighing the evidence and making the  
11 decision. *Browner v. Secretary of Health and Human Services*, 839  
12 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
13 evidence to support the administrative findings, or if there is  
14 conflicting evidence that will support a finding of either  
15 disability or nondisability, the finding of the Commissioner is  
16 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
17 1987).

#### 18 **ALJ'S FINDINGS**

19 The ALJ found plaintiff was insured through December 31,  
20 2013. At step one, he found she did not engage in substantial  
21 gainful activity after onset on January 26, 2009 (Tr. 16). At  
22 step two, he found plaintiff had severe impairments of "obesity,  
23 asthma, sleep apnea, migraine headaches, and a somatoform  
24 disorder" (Tr. 16). At step three, he found plaintiff's  
25 impairments, alone and in combination, did not meet or medically  
26 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
27 Subpart P, Regulations No. 4 (Tr. 19). He assessed an RFC for a  
28 range of light work (Tr. 19-21), and determined that plaintiff's

1 medically determinable impairments could reasonably be expected to  
2 cause the alleged symptoms; however, her statements concerning the  
3 intensity, persistence and limiting effects of the symptoms were  
4 not credible to the extent they were inconsistent with the ALJ's  
5 RFC assessment (Tr. 21). At step four, the ALJ found that  
6 plaintiff was unable to perform any of her past relevant work (Tr.  
7 21). At step five, based on the vocational expert testimony and  
8 plaintiff's age, education, work experience, and RFC, the ALJ  
9 found that there were light and sedentary jobs in the national  
10 economy that plaintiff could perform (Tr. 22). Accordingly, the  
11 ALJ concluded that plaintiff was not disabled as defined by the  
12 Social Security Act from January 26, 2009, through the date of his  
13 decision, March 31, 2010 (Tr. 22-23).

#### 14 ISSUES

15 Plaintiff alleges the ALJ should have found at step two that  
16 she suffered from the severe impairments of fibromyalgia and sero-  
17 negative inflammatory arthritis (ECF No. 17 at 14-17). She also  
18 alleges the ALJ erred because the substantial weight of the  
19 evidence supports a more limited mental RFC determination (ECF No.  
20 17 at 17-20), and that the ALJ did not properly consider  
21 plaintiff's testimony regarding her limitations from her various  
22 impairments (ECF No. 17 at 20-22). Lastly, plaintiff argues that  
23 new evidence presented to the Appeals Council shows that plaintiff  
24 is disabled (ECF No. 17 at 22-24).

25 The Commissioner asserts the evidence before the ALJ did not  
26 support the diagnoses of fibromyalgia and inflammatory arthritis  
27 (ECF No. 23 at 6-7), the ALJ reasonably assessed that plaintiff's  
28 mental functioning only resulted in a below average pace and that

1 she would be off-task up to 5% of the time (ECF No. 23 at 8-11),  
2 the ALJ provided specific reasons supported by the record to find  
3 plaintiff's statements concerning her symptoms not entirely  
4 credible (ECF No. 23 at 11-14), and the new evidence is immaterial  
5 (ECF No. 23 at 15-17).

## 6 DISCUSSION

### 7 A. New Evidence

8 Plaintiff argues that new evidence presented to the Appeals  
9 Council shows that plaintiff is unable to work (ECF No. 17 at 22-  
10 24). Plaintiff directs the court's attention to the May 20, 2010  
11 report of treating physician Rita M. Snow, M.D., who opined that  
12 "[g]iven [plaintiff's] inflammatory arthritis and her fibromyalgia  
13 I do not feel she is able to work on a consistent basis" (Tr.  
14 498). (ECF No. 17 at 23-24).

15 The regulation provides that the Appeals Council shall  
16 "consider" additional evidence, unless the evidence is not new,  
17 material, or related to the period of the ALJ's decision. 20  
18 C.F.R. § 404.970(b)(1). Accordingly, if the Appeals Council finds  
19 the evidence is not material or not related to the period of the  
20 ALJ's decision, then the Appeals Council did not "consider" the  
21 evidence. If the Appeals Council did not consider the evidence  
22 (i.e. it finds the evidence not material or not related to the  
23 relevant period), the new evidence is not a part of the  
24 administrative record, and the materiality/good cause inquiry must  
25 be applied.

26 Here, the Appeals Council indicated it looked at the records  
27 dated May 3 to May 10, 2010 from Northwest and April 21 to May 20,  
28 2010 from Physician's Clinic of Spokane (Tr. 2). The Appeals



1 Council noted that the ALJ decided the case through March 31,  
2 2010, and the new information concerned a later time. The Appeals  
3 Council determined that the new information did not affect the  
4 decision about whether plaintiff was disabled before March 31,  
5 2010 (Tr. 2). Consequently, the new evidence is not a part of the  
6 administrative record, and the materiality/good cause inquiry must  
7 be applied. *See infra*.

8 Section 405(g) expressly provides for remand where new  
9 evidence is material and there is good cause for the failure to  
10 incorporate the evidence in a prior proceeding. *Burton v.*  
11 *Heckler*, 724 F.2d 1415, 1417 (9<sup>th</sup> Cir. 1984). To be material, the  
12 new evidence must bear directly and substantially on the matter in  
13 issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9<sup>th</sup> Cir. 1985).  
14 There must also be a reasonable possibility that the new evidence  
15 would have changed the outcome if it had been before the  
16 Secretary. *Booz v. Secretary of Health and Human Services*, 734  
17 F.2d 1378, 1380-1381 (9<sup>th</sup> Cir. 1984).

18 The new evidence submitted by plaintiff is immaterial because  
19 it does not concern the period under review. Dr. Snow's opinion  
20 was rendered more than two months after the ALJ's decision in this  
21 case. Moreover, plaintiff has not shown good cause for her  
22 failure to incorporate these records prior to the ALJ's decision.  
23 Plaintiff offers no reason why she failed to solicit an opinion  
24 from Dr. Snow at an earlier time. A logical explanation is that  
25 when plaintiff failed to succeed on her disability claim, she  
26 sought out new evidence to support her assertion of disability.  
27 The good cause requirement would "be meaningless if such  
28 circumstances were sufficient to allow introduction of new

1 evidence." *Allen v. Secretary of Health and Human Services*, 726  
2 F.2d 1470, 1473 (9<sup>th</sup> Cir. 1984).

3 Since Plaintiff fails to meet the materiality and good cause  
4 requirements, the undersigned declines to consider the new  
5 evidence submitted to the Appeals Council.

6 **B. Severe Impairments**

7 Plaintiff contends that the ALJ should have determined that  
8 she suffered from the severe impairments of fibromyalgia and sero-  
9 negative inflammatory arthritis (ECF No. 17 at 14-17).

10 The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c),  
11 provide that an impairment is severe if it significantly limits  
12 one's ability to perform basic work activities. An impairment is  
13 considered non-severe if it "does not significantly limit your  
14 physical or mental ability to do basic work activities." 20  
15 C.F.R. §§ 404.1521, 416.921. Plaintiff has the burden of proving  
16 that she has a severe impairment. 42 U.S.C. § 423(d)(1)(A); 20  
17 C.F.R. § 423(d)(1)(A), 416.912. In order to meet this burden,  
18 Plaintiff must furnish medical and other evidence that shows that  
19 she is disabled. 20 C.F.R. § 416.912(a). In the absence of  
20 objective evidence to verify the existence of an impairment, the  
21 ALJ must reject the alleged impairment at step two of the  
22 sequential evaluation process. SSR 96-4p.

23 At the administrative hearing, medical expert Steven Gerber,  
24 M.D., testified he saw no clinical or laboratory evidence of  
25 arthritis in the record (Tr. 43). He stated that "[o]ne cannot  
26 have arthritis with normal laboratory studies, normal physical  
27 examinations and in the absence of any characteristic x-ray  
28 changes" (Tr. 45). Dr. Gerber indicated he believed that there

1 was a misdiagnosis of arthritis (Tr. 45). He further stated that  
2 he saw no documentation of fibromyalgia (Tr. 44). Instead, he  
3 reported he saw numerous negative examinations that typically  
4 exclude the diagnosis of fibromyalgia (Tr. 44).

5 Plaintiff concedes that David Sandoval, M.D., noted on  
6 November 13, 2008, that plaintiff's fibromyalgia spots were  
7 negative (Tr. 349) and indicated arthralgia<sup>1</sup> on January 5, 2009,  
8 but stated he was unsure about the diagnosis (Tr. 324-326). (ECF  
9 No. 17 at 15). As noted by the ALJ, on May 13, 2009, it was noted  
10 under fibromyalgia that examination has been and remains  
11 completely normal and that laboratory studies including CPK and  
12 electrodiagnostic workup were all normal (Tr. 17, 376).

13 The evidence before the ALJ did not establish that  
14 fibromyalgia and inflammatory arthritis were severe impairments.  
15 While plaintiff points to May 3, 2010 records from Jeffrey Butler,  
16 M.D., (Tr. 465-482) and Dr. Snow's May 20, 2010 report (Tr. 498),  
17 those records post-date the ALJ's March 31, 2010, decision. As  
18 explained above, the undersigned declines to consider the new  
19 evidence submitted to the Appeals Council. *Supra*. The ALJ's step  
20 two determination is supported by the record and free of legal  
21 error.

### 22 **C. Mental Limitations**

23 With respect to Plaintiff's mental ability, Plaintiff argues  
24 that limitations assessed by Dennis R. Pollack, Ph.D., and medical  
25 expert Marian Martin, Ph.D., reflect greater restrictions from a  
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27 <sup>1</sup> Dr. Gerber explained that arthralgia is a symptom, not a  
28 diagnosis of arthritis (Tr. 43).

1 psychological standpoint than as assessed by the ALJ in this case.  
2 (ECF No. 17 at 17-20).

3 Dr. Pollack examined plaintiff on February 25, 2010, and  
4 completed a psychological assessment on February 26, 2010 (Tr.  
5 438-448). The results of the MMPI-2 indicated that plaintiff may  
6 have been exaggerating her difficulties (Tr. 442), and Dr. Pollack  
7 noted that the results of the personality testing suggested the  
8 possibility of exaggeration (Tr. 443). Dr. Pollack nevertheless  
9 indicated that the results of the neuropsychological testing  
10 suggested the possibility of a neuropsychological deficit (Tr.  
11 443). He diagnosed a somatoform disorder<sup>2</sup>, NOS, dysthymic  
12 disorder<sup>3</sup> and cognitive disorder and gave plaintiff a GAF score of  
13 50<sup>4</sup> (Tr. 443). Dr. Pollack filled out a Mental Medical Source  
14 Statement and checked boxes indicating that plaintiff had marked  
15 limitations in the ability to maintain attention and concentration  
16 for extended periods and in the ability to complete a normal  
17 workday or workweek without interruptions from psychologically  
18 based symptoms and to perform at a consistent pace without an  
19 unreasonable number and length of rest periods (Tr. 445-448). Dr.

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21 <sup>2</sup> Somatoform disorders are characterized by physical  
22 symptoms or by perceived defects in appearance. Symptoms or  
23 perceived defects cannot be explained by an underlying physical  
disorder. THE MERCK MANUAL 1736 (18th ed. 2006).

24 <sup>3</sup> Dysthymia is defined as a low-level or subthreshold form  
25 of depression. THE MERCK MANUAL 1705 (18th ed. 2006).

26 <sup>4</sup> A GAF of 50-41 reflects: "[s]erious symptoms (e.g.,  
27 suicidal ideation, severe obsessive rituals, frequent  
shoplifting) or any serious impairment in social, occupational,  
28 or school functioning (e.g., no friends, unable to keep a job)."  
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4<sup>th</sup> ed. 1994).

1 Pollack opined that plaintiff had mild or no limitation with  
2 respect to all other categories of mental ability (Tr. 445-448).

3 Dr. Martin testified as a medical expert at the  
4 administrative hearing held on March 5, 2010 (Tr. 47-52). Dr.  
5 Martin stated that the record reflected diagnoses of a dysthymic  
6 disorder, an anxiety disorder, and a somatoform disorder, NOS (Tr.  
7 49). Dr. Martin opined that plaintiff would have mild impairments  
8 of daily living, mild impairments of social functioning, moderate  
9 impairments of concentration, persistence and pace and no episodes  
10 of decompensation (Tr. 50). Dr. Martin testified that plaintiff's  
11 ability to sustain her concentration is quite good but, because of  
12 physical symptoms, there would be times where she would have more  
13 trouble sustaining concentration (Tr. 51). He described these  
14 time periods as when there was "increased stress" (Tr. 51). Dr.  
15 Martin stated that plaintiff would have moderate limitations with  
16 her ability to maintain attention and concentration for extended  
17 periods and with her ability to complete a normal workday or  
18 workweek without interruptions from psychologically based symptoms  
19 and to perform at a consistent pace without an unreasonable number  
20 and length of rest periods (Tr. 50).

21 The ALJ noted Dr. Pollack's findings and remarked that Dr.  
22 Pollack appears to always find moderate or marked limitations for  
23 the limitations he assessed for plaintiff (Tr. 18). While there  
24 is no evidence that Dr. Pollack was directly involved with  
25 plaintiff's application process, when a physician is involved in  
26 the application process, thus becoming an advocate for the  
27 claimant, an ALJ is entitled to consider this factor in evaluating  
28 his testimony. *Crane v. Shalala*, 76 F.3d 251, 254 (9<sup>th</sup> Cir.

1 1996). In any event, the ALJ determined that plaintiff's  
2 treatment records did not support a finding that she suffers from  
3 any significant mental difficulties as assessed by Dr. Pollack  
4 (Tr. 18). This findings is supported by the record. On March 19,  
5 2009, Dave Sanford, Ph.D., filled out a Psychiatric Review  
6 Technique form indicating that plaintiff's anxiety-related  
7 disorders resulted in no greater restrictions than a mild  
8 limitation on activities of daily living (Tr. 353-366). On August  
9 5, 2009, Eugene Kester, M.D., indicated there was no worsening of  
10 plaintiff's condition and that plaintiff was stable on prozac (Tr.  
11 396).

12 Furthermore, as noted by the Commissioner, Section II of Dr.  
13 Pollack's Mental Functional Capacity Assessment form asks the  
14 consultant to explain the summary conclusions in narrative form  
15 (Tr. 447). (ECF No. 23 at 8). Although Dr. Pollack wrote "See  
16 report," he did not provide an assessment of Plaintiff's mental  
17 functional capacity in the report (Tr. 438-444). Of significance,  
18 the results of Dr. Pollack's MMPI-2 test indicated that plaintiff  
19 may have been exaggerating her difficulties on exam (Tr. 442), and  
20 Dr. Pollack noted that the results of the personality testing  
21 suggested the possibility of exaggeration (Tr. 443). Based on the  
22 foregoing, the undersigned finds that the ALJ properly discounted  
23 the opinions of Dr. Pollack in this case.

24 With respect to the medical expert, that ALJ correctly noted  
25 that Dr. Martin indicated that only **under stress** did plaintiff  
26 display moderate difficulties (Tr. 18, 51).

27 Based on the reports of the above medical professionals, the  
28 ALJ found that plaintiff "had a below average pace and would be

1 off-task up to 5% of the time" (Tr. 19). The undersigned finds  
2 that the ALJ's mental RFC finding is in accord with the weight of  
3 the record evidence. Accordingly, the ALJ did not err in so  
4 finding in this case.

5 **D. Credibility**

6 Plaintiff asserts that the ALJ erred by failing to properly  
7 consider plaintiff's testimony regarding her limitations from her  
8 various impairments. (ECF No. 17 at 20-22).

9 The ALJ evaluated plaintiff's credibility and found her less  
10 than fully credible in this case (Tr. 19-21). It is the province  
11 of the ALJ to make credibility determinations. *Andrews v.*  
12 *Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's  
13 findings must be supported by specific cogent reasons. *Rashad v.*  
14 *Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the claimant  
15 produces medical evidence of an underlying medical impairment, the  
16 ALJ may not discredit testimony as to the severity of an  
17 impairment because it is unsupported by medical evidence. *Reddick*  
18 *v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative  
19 evidence of malingering, the ALJ's reasons for rejecting the  
20 claimant's testimony must be "clear and convincing." *Lester v.*  
21 *Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are  
22 insufficient: rather the ALJ must identify what testimony is not  
23 credible and what evidence undermines the claimant's complaints."  
24 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup>  
25 Cir. 1993).

26 As noted above, the results of Dr. Pollack's MMPI-2 test  
27 indicated that plaintiff may have been exaggerating her  
28 difficulties on exam (Tr. 442), and Dr. Pollack noted that the

1 results of the personality testing suggested the possibility of  
2 exaggeration (Tr. 443). Although the ALJ did not discuss Dr.  
3 Pollack's findings in this regard, this possible exaggeration of  
4 symptoms by plaintiff is an important detail in the record that  
5 should be considered when discussing plaintiff's credibility.

6 The ALJ noted that plaintiff testified she was unable to work  
7 full-time due to chronic fatigue, pain, and flu-like symptoms (Tr.  
8 19, 40). However, plaintiff reported that ibuprofen helped, and  
9 that muscle relaxants and her CPAP mask for sleep apnea helped her  
10 sleep (Tr. 20, 57). The ALJ also noted that plaintiff reported  
11 less flare-ups/exacerbations since beginning methotrexate  
12 treatment (Tr. 20).

13 Medical expert Dr. Gerber testified that he saw no clinical  
14 or laboratory evidence of arthritis in the record (Tr. 20, 43).  
15 He stated that "[o]ne cannot have arthritis with normal laboratory  
16 studies, normal physical examinations and in the absence of any  
17 characteristic x-ray changes" (Tr. 45). Dr. Gerber further stated  
18 that he saw no documentation of fibromyalgia (Tr. 44). The ALJ  
19 indicated that plaintiff had been given a diagnosis of arthralgia  
20 in 2008, but with a tapered dose of prednisone, she had  
21 improvements in all her complaints. In May 2009, it was indicated  
22 that she had arthralgias and fatigue of unclear etiology, with  
23 examinations and tests that had been completely normal (Tr. 20).  
24 The ALJ indicated that in July 2009, she had "stable medical  
25 problems" and in late 2009 and early 2010, she was noted to be  
26 doing better (arthralgia) and improved (fibromyalgia) (Tr. 21).

27 Medical expert Dr. Martin testified that plaintiff's ability  
28 to sustain her concentration was quite good but, because of



1 physical symptoms, there would be times where she would have more  
2 trouble sustaining concentration (Tr. 51). He described these  
3 time periods as when there was "increased stress" (Tr. 51). The  
4 ALJ indicated that Dr. Martin believed that if plaintiff stayed on  
5 medication and participated in counseling, she would learn how to  
6 manage her complaints better (Tr. 20).

7 The undersigned also finds it important to note that  
8 plaintiff reported to Dr. Pollack in February 2010 that she  
9 performed the household chores of washing dishes, making beds,  
10 dusting and vacuuming (Tr. 440). However, plaintiff testified at  
11 the administrative hearing that as far as household chores, she  
12 only occasionally unloaded the dishwasher (Tr. 20).

13 After reviewing the record, the undersigned finds that the  
14 reasons provided by the ALJ for discounting plaintiff's subjective  
15 complaints are clear, convincing, and fully supported by the  
16 record. Accordingly, the ALJ did not err by concluding that  
17 plaintiff's subjective complaints regarding the extent of her  
18 functional limitations were not fully credible in this case.

#### 19 CONCLUSION

20 Having reviewed the record and the ALJ's conclusions, this  
21 court finds that the ALJ's decision is free of legal error and  
22 supported by substantial evidence. Accordingly,

#### 23 IT IS HEREBY ORDERED:

24 1. Defendant's Motion for Summary Judgment (**ECF No. 22**) is  
25 **GRANTED.**

26 2. Plaintiff's Motion for Summary Judgment (**ECF No. 16**) is  
27 **DENIED.**

28 ///

S/James P. Hutton  


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JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE